

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

Original and Affidavit of Mailing

77-1454

To be argued by
ZACHARY W. CARTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1454

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES WILLIAMS, a/k/a "Chaz", and
ROBERT McGRAY, a/k/a "Sabu",

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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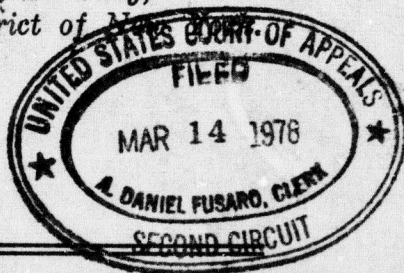




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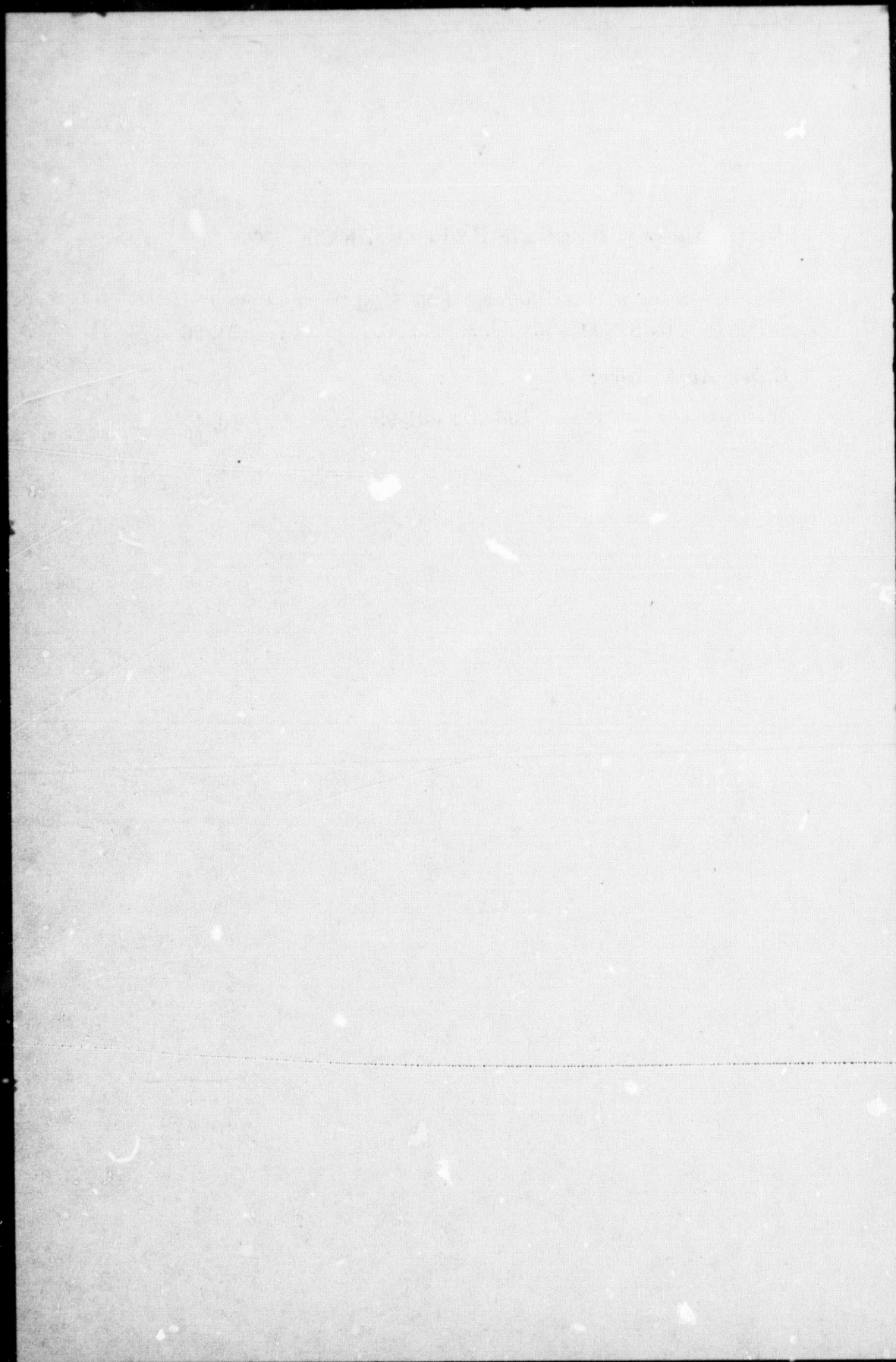
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UNITED STATES OF AMERICA,

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—against—

CHARLES WILLIAMS, a/k/a "Chaz", and
ROBERT McGRAY, a/k/a "Sabu",

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Charles Williams, a/k/a "Chaz", and Robert McGray, a/k/a "Sabu", appeal from judgments of conviction entered respectively on September 15, 1977 and September 19, 1977 in the United States District Court for the Eastern District of New York (Henry Bramwell, J.) convicting them, after a jury trial, of armed bank robbery, in violation of Title 18, United States Code, Sections 2113(a), 2113(d), and 2, and conspiracy to commit bank robberies in violation of Title 18, United States Code, Section 371. Williams and McGray were named in each count of a five count indictment. Count One charged defendants, together with Curtis King, Ronald Bell, Gary Graham, and Robert Hairston, with conspiracy to rob a series of banks, within the Eastern District of New York and elsewhere, between January 1, 1976

and May 31, In Counts Two and Three, defendants were charged, together with Curtis King, Ronald Bell, and Gary Graham, with the armed robbery of an European American Bank located in Westbury, Long Island, on February 9, 1976. Counts Four and Five charged defendants and Curtis King with the May 6, 1976 armed robbery of a Nasau Savings and Loan Association branch located in Rockville Centre, New York.

Williams was sentenced to imprisonment for a period of five years on the conspiracy count, a general sentence of twenty years imprisonment on Counts Two and Three (Sections 2113(a) and (d) respectively), and a general sentence of twenty-five years imprisonment on Counts Four and Five (Sections 2113(a) and (d) respectively). The general sentence on Counts Four and Five is to run consecutively with the general sentence on Counts Two and Three. The sentence imposed on Count One is to run concurrently with all other sentences imposed.¹

McGray was sentenced to imprisonment for a period of five years on Count One, a general sentence of twenty years imprisonment on Counts Two and Three, and a general sentence of twenty years imprisonment on Counts Four and Five. The general sentence on Counts Four and Five is to run consecutively to the general sentence imposed on Counts Two and Three. The sentence imposed

¹ Originally, the sentence imposed was to run consecutively to the twenty-five year term for bank robbery and the twenty-five year term for a New York State armed robbery Williams was currently serving. However, pursuant to Williams's Rule 35 motion, Judge Bramwell later reduced Williams's sentence to run concurrently with any prison term Williams was then serving.

on Count One is to run concurrently with all other sentences. Defendants are presently incarcerated.²

On appeal defendants urge reversal of their convictions on a variety of grounds. *First*, McGray claims he was denied the effective assistance of counsel. *Second*, McGray contends that a conspiracy to rob a series of banks was not proved and that evidence, which he characterizes as "prejudicial", concerning the March 11, 1976 robbery of the Kilbourne State Bank in Milwaukee, Wisconsin, which robbery was set forth in the indictment as an overt act of the conspiracy charged in Count One, should not have been admitted at trial. Williams argues, apparently in the alternative, that evidence of the Milwaukee robbery was, at best, similar act evidence, which should have been subject to a more extensive limiting instruction than was given by the court. *Third*, both defendants claim that the court somehow implied that the reasonable doubt standard did not apply to the testimony of an accomplice witness. *Fourth*, defendants argue that the court's denial of McGray's application for the production, at Government expense, of a witness incarcerated in a Wisconsin federal prison was improper. *Fifth*, defendants contend that Judge Bramwell, through questions he posed during cross-examination, "discredited" a defense witness, Alvin Scott. *Sixth*, defendants argue

² Co-defendants Ronald Bell and Gary Graham were severed and tried before Chief Judge Jacob Mishler. Bell, who was charged in Counts One, Two, and Three, was convicted of the conspiracy count and of the armed robbery charged in Counts Two and Three. Bell was sentenced to imprisonment for a term of fifteen years, to run consecutively to a three year prison term he was currently serving on a grand larceny charge. Graham, who was convicted on the conspiracy count only, was sentenced to five years probation. Bell's conviction was affirmed by this Court on January 3, 1978. Co-defendant Robert Hairston, who was charged in the conspiracy count only and pled guilty, received a prison term of five years.

that in-court identifications should have been disallowed where photo-spreads shown to witnesses were not produced. *Seventh*, defendants claim that the admission of two signed confessions of the accomplice witness relating to two bank robberies, after a third signed confession relating to another robbery had been offered and received in evidence on behalf of the defense, was improper. *Eighth*, defendants argue that the court, through its charge, improperly permitted the jury to convict them on both the 2113(a) and 2113(d) counts charged for each robbery. Finally, defendants argue that there is an unwarranted disparity between the sentences they received and the sentences of severed co-defendants tried before another judge.

Statement of Facts

A. The Government's Case

The Government's proof at trial established that during January and early February of 1976, defendants Charles Williams, also known as "Chaz", and Robert McGray, also known as "Sabu", recruited, assembled, and trained a group of individuals, including Curtis King, Ronald Bell, and Gary Graham, to rob banks in the New York area and elsewhere. Williams and McGray, who apparently had refined the act of bank robbery to somewhat of an art form, shared their expertise with their accomplices and eventually undertook the robbery of a European American Bank in Westbury, Long Island on February 9, 1976 (Counts Two and Three), the Kilbourne State Bank in Milwaukee, Wisconsin on March 11, 1976 (Overt Act Two of Count One), and the Nassau Savings and Loan Association in Rockville Centre, New York on May 6, 1976 (Counts Four and Five). Each robbery was remarkable for its timing and execution. Ronald Bell and Gary Graham directly participated in the Feb-

ruary 9th robbery only, but they shared in the proceeds of the Wisconsin robbery—apparently in consideration for their continued membership in this *cadre* of bank robbers.

The Government's proof at trial was developed from several sources: (1) the testimony of Curtis King who participated in each of the aforesaid robberies; (2) the testimony of employees of each of the three banks and (3) the testimony of individuals who observed activities relating to cars used in the robberies of these banks.

From the collective contribution of the witnesses and other evidence, the following facts emerged:

Sometime before the beginning of February, 1976, Ronald Bell invited Curtis King to his home to meet Charles Williams and Robert McGray (T. 48). What transpired after King arrived at Bell's home might best be characterized as a job interview. Williams and McGray questioned King about his past experience as an armed robber. The defendants were particularly interested in whether King had any bank robbery experience. King admitted to them that he had no expertise in that particular area, but that he would be willing to learn. King left the meeting after giving Williams his telephone number (T. 49-50).

About one week after this first meeting, the defendants contacted King and met with him at his apartment in Brooklyn (T. 51). There, Williams and McGray outlined for King their formula for bank robbery. Each member of the bank robbery team was assigned a specific task. One robber would act as "floorman." It was the floorman's responsibility to "secure" the bank by keeping everyone "in check". It was also his job to time the robbery with a stopwatch and instruct the others when it was time to leave by giving the command "raise". McGray was the designated floorman (T. 66). The remain-

ing robbers, including King and Williams, were designated as "countermen". Their job was to vault the teller's counter and retrieve money from the cash drawers (T. 51-52). Williams and McGray then proceeded to instruct King in precisely how he was to function as a counterman. Stacks of paper were placed at various intervals around King's apartment, and King was timed with a stopwatch as he scurried about retrieving the simulated cash bundles (T. 52, 193).

There were several more sessions at King's apartment, where he was schooled by the defendants in various other aspects of bank robbery. King was taught to distinguish "wrap" money from "bait" money (T. 53). He learned the significance of a "flip spot"—that place where one switches from a getaway car to a "legit" car or vice versa (T. 54). He also learned the term "gear", which covers all physical paraphernalia, including arms, gloves, changes of clothing, and ski masks that are used in a robbery (T. 54). King did not need to be taught how to obtain getaway cars, however, since car theft was a bit of expertise he brought with him into this enterprise (T. 55).

Several weeks after King had first been introduced to the defendants and shortly before the actual robbery, it was determined that the European American Bank located on Brush Hollow Road in Westbury, Long Island would be robbed (T. 221). At a point prior to the robbery and in preparation for it, Williams, McGray, King, Bell, and Graham met together. Graham who was in need of "a few dollars" was invited into the group as the getaway car driver by Bell (T. 55, 56). At that meeting it was settled that Bell, Williams, and King, would act as countermen while McGray would act as floorman as originally planned. King was directed to assemble the "gear" needed for the robbery, including guns, clothing, bags, masks, and gloves. King provided

two pistols and a shotgun while Williams brought his own handgun (T. 61).

King recalled that on the morning of the day preceding the robbery, he along with Williams, McGray, and another individual traveled to New Jersey to steal a car. They found a four-door Plymouth with its motor running, and King drove it back to the New York area. King, Williams, and McGray parked the car on Farmers Boulevard in Long Island.³

On the morning of the robbery, Gary Graham picked up King at King's residence in Graham's Toyota (T. 61). Together they drove to the area where the stolen car had been hidden and waited for the others to arrive. Bell arrived at the rendezvous a short time later in his burgundy Lincoln Continental accompanied by a young woman (T. 62, 79). Shortly thereafter, Williams and McGray arrived in a stationwagon (T. 62-63). After everyone was assembled, King left Graham's car and got into the "hot" New Jersey Plymouth. Williams and McGray led the procession of cars "in convoy fashion" to the Long Island bank (T. 62).

When they arrived in the area of the bank, everyone followed Williams to the "flip spot", an apartment complex located near the bank (T. 64). George Stevens, who was employed at the Westwood Village Apartment complex located on Brush Hollow Road about two minutes away from the European American Bank, testified that on the morning of February 9, 1976, he observed three or four cars, including a stationwagon, a green Plymouth and a red Lincoln Continental, drive into the complex. Stevens

³ The Government stipulated that the New Jersey Plymouth identified as the getaway car in the first robbery was in fact stolen on the morning of the February 9th and not the day before as King had recalled.

stated that he thought this unusual because all of the occupants of the cars were black and the complex was predominantly white. Stevens noted further that the occupants of the red Lincoln Continental were a black male and female. (T. 659-669).

At the complex, Williams, McGray, King, and Bell, who were then neatly attired in "dress clothing", put the "gear" clothing King had assembled over the garments they arrived in. Afterwards, Williams, McGray, King, and Bell joined Gary Graham in the stolen car and proceeded the short distance to the bank. Upon arriving there, Williams, McGray, King, and Bell, now masked and armed, entered the bank (T. 65). According to plan, McGray, wielding a shotgun, entered first and directed everyone inside to get down on the floor (T. 65). Williams, King, and Bell followed McGray into the bank, vaulted the counter, and began looking for and taking money (T. 65-67).⁴ Meanwhile, McGray kept track of time on a stopwatch he had brought into the bank (T. 66).⁵ On McGray's command, everyone left the bank (T. 66-67). The four robbers then joined Graham in the stolen car and sped off toward the apartment com-

⁴ King, who had already testified that he was a rookie in this bank robbery business, further testified, almost incredibly, that he was such a novice that he could not locate any money anywhere he looked and that he left the bank without any money at all (T. 310-311). But Renee McCann, a teller at the bank, later testified that indeed there had been one robber who searched frantically for money, found none, and left the bank empty-handed (T. 588).

⁵ A series of photographs taken during the robbery by a surveillance camera depicted a masked figure holding a shotgun in one hand and a stopwatch he appeared to be consulting in the other (Government Exhibit 1-B). King identified the individual depicted in the photograph as Robert McGray (T. 73).

plex.⁶ While enroute to the complex, King began stuffing all the "gear" and money into a duffel bag (T. 79). When they arrived back at the complex, King joined Graham in his Toyota, Williams and McGray went back to their stationwagon, and Bell returned to his Lincoln. Everyone then left the complex and headed back toward Brooklyn (T. 79-80). Eventually, Williams, McGray, King, Bell, and Graham met at King's house, where they divided the proceeds of the robbery (T. 80).

After a period of some weeks had passed (during the spring of 1976), King received a long distance phone call from Robert McGray during which McGray ascertained that King was ready to "go to work" again (T. 81). Charles Williams then took over the phone from McGray and a discussion was had regarding who from among the "group" would be best suited and most able at that particular time to come out and join Williams and McGray and undertake a bank robbery. As a result of their conversation, King contacted Bell and it was decided, after a discussion, that King would make the trip (T. 82). A few days later, King received another long distance call from Williams. Williams advised King that all of his travel arrangements would be taken care of and that he should expect a call from a woman named Theresa Jordan, a girlfriend of Williams (T. 84). Theresa Jordan did in fact call King and told him that everything was arranged for them to take a trip to Chicago (T. 84). King recalled that on a Sunday, Bell came to his apartment and drove him out to Long Island, where they were met by Theresa Jordan. Bell then drove King and Jordan to the airport. Jordan took care of the tickets and together King and

⁶ Lena Bischoff, an employee of the bank, ran to the door in time to see a green car speed away. Later that same day, she was taken to the Westwood Village apartment complex where she identified the green New Jersey Plymouth which had been abandoned there as the car she had seen leaving the bank (T. 580, 582).

Jordan flew to Chicago (T. 84-85). Upon their arrival at O'Hare Airport, King and Jordan were met by Williams and an individual named Robert Hairston (T. 85). The group then proceeded to the Hyatt Regency Hotel, which was located about one mile from the airport (T. 86). Upon arriving at the hotel, King discovered that rooms had already been reserved for them in the name of "McIntosh". King subsequently became aware that "McIntosh" was the name currently being used by Charles Williams (T. 95-97). On the same day that he arrived, King and Robert Hairston drove into downtown Chicago to a hotel where they picked up Robert McGray. McGray was transported back to the Hyatt Regency, where he assumed occupancy of one of the reserved rooms (T. 86-87).

King recalled that on the day following his arrival there was some discussion involving the rental of an additional car (T. 87). After that matter was disposed of, Williams, McGray, King, and Hairston took the first of many drives along a route which connected Chicago and Milwaukee in search of a bank that had, among other things, a "decent flip spot" (T. 88-89). The search for a likely bank to rob spanned a three-day period. During that period the group used two cars; a blue Chevrolet with a white top and a brown and beige American Motors car (T. 89). Finally, their money running low, Williams, McGray, King and Hairston traveled to Milwaukee, intent on finding a "ripe" bank in that city (T. 90). On the day of the robbery in Milwaukee, the group had three cars; the previously described Chevrolet and American Motors cars, and in addition, a gray car driven by Robert Hairston (T. 90-91). The Chevy and the gray car were "legit" cars. King understood that the brown American Motors car was "hot" (T. 91-92).

After they had arrived in Milwaukee and had begun looking for a bank in earnest, Robert Hairston, who was following the others in the gray car, became separated from the group when he failed to make a right turn. It appeared at the time that a police car was following him

(T. 92). Williams, McGray, and King proceeded, without Hairston, in the two remaining cars and eventually settled on a bank and "flip spot". The "flip spot" was a driveway located behind a house. Before the robbery, the defendants and King stashed the legit car (the blue and white Chevy) at the flip spot, donned their "gear", and proceeded to the bank in the "hot" American Motors car. Upon arriving at the bank, McGray entered first and "secured the floor". Williams and King followed McGray and vaulted opposite ends of the counter. After some confusion with a teller, Williams and King "proceeded to work". McGray gave the signal to leave, which was the word "raise", and the three of them left the bank.⁷ The defendants and King drove back to the flip spot, changing their clothes along the way (T. 94). When they arrived back at the flip spot, they abandoned the "hot" American Motors car and proceeded to the "legit" white and blue Chevy. The robbers put all of the gear and loot into the

⁷ Two officers (Allen Hackbarth and Roger Kramer) of the Kilbourne State Bank, located at 6055 West Lisbon Avenue in Milwaukee, testified that on the afternoon of March 11, 1976, three men in ski masks entered the bank.

Allen Hackbarth first saw an individual with a shotgun, who commanded everyone to "hit the floor". From his position on the floor, he observed another individual taking money from the tellers' drawers. Eventually, Hackbarth heard a voice count down "5 . . . 4 . . . 3 . . . 2 . . . 1 race!" and on that command the robbers left (T. 461-462). From their voices, Hackbarth believed the robbers were black (T. 464). In addition, Hackbarth saw the robbers flee the scene in a brown car.

Roger Kramer was in a back room when he heard a commotion and emerged in time to see a masked individual going through cash drawers "very quickly. He did it very quickly, extremely fast". In addition, it appeared to Kramer that the robbers were wearing two sets of clothes. Kramer noted the presence of an individual armed with a shotgun who directed him to get down to the floor. He too heard what sounded to him like the command "race!", upon which the two robbers behind the counter left (T. 460-464).

trunk of the "legit" car, and King climbed into the trunk along with it. The group then drove away from the flip spot and back towards Chicago, stopping after about 45 minutes to liberate King from the trunk (T. 94-95). Eventually, Williams, McGray, and King arrived back at the Hyatt Regency Hotel in Chicago, where they were reunited with Hairston. The proceeds of the robbery, some \$37,000, were divided among them and the gear disposed of. Afterwards, King, Jordan, and another woman who had joined them flew back to New York. King believed that Williams, McGray, and Hairston were destined for Atlanta (T. 95). Upon King's return to New York, King gave Bell and Graham \$2,000 apiece from the robbery proceeds (T. 103).

The incidental observations of two witnesses on March 11, 1976 set in motion a chain of investigative events that disclosed evidence which established the identities of the masked individuals who robbed the Kilbourne State Bank. The witnesses were Celia Dobberke and Erwin Meyer.

At approximately 8:45 A.M. on March 11, 1976, Celia Dobberke, the wife of a Milwaukee police officer, was sitting by a window in her home when she observed a blue car with a light top drive up and park just across the street. She further observed four black males emerge from the car and stretch (T. 508). She then saw the blue car drive away with one of the occupants. The remaining three individuals walked to and entered a car she had observed parked just around the corner from her house. She described the car as a brown four door car, but, most importantly, she jotted down the license plate numbers of both cars. She also recorded the color of the plates and reported her observations to the police and later to the Federal Bureau of Investigation (T. 506).

Detective Thomas Langford of the Milwaukee Police Department testified that his investigation disclosed that the blue and white car Mrs. Dobberke had observed

was registered to the Jet Rental Car Company, Des Plaines, Illinois. Further investigation disclosed that the car was rented by one Louis McIntosh on March 8, 1976 and was scheduled to be returned on March 12, 1976. McIntosh presented a New York driver's license and indicated that he was staying at the Hyatt House Hotel in Schiller Park, Illinois (T. 732, 744-745).

Caroline Timms of the Econocar Company located near Atlanta, Georgia testified and produced a rental agreement which established that the other car which Mrs. Dobberke observed on March 11 was rented to Ms. Sheila Duhart on February 18, 1976. The car was returned on March 15, 1976. The rental application listed the second driver as Louis McIntosh (T. 482-487).

In the afternoon of March 11, 1976, Erwin Meyer, a retired gentleman who lived on 6663 West Lisbon Avenue,⁸ in Milwaukee, was looking out of his back door onto a driveway behind his residence when he observed three black men arrive in a tan Matador.⁹ These three individuals got out of the Matador and entered a blue and white automobile. Most importantly, he observed one of the men climb into the trunk of the blue and white car with a duffel bag. The three men then left in the blue and white car (T 526-528). Meyer reported his observation to the authorities and on that very day pointed out the abandoned Matador to Detective Langford. Detective Langford testified that the Matador, which bore a Wisconsin license plate, was registered to the National Car Rental Company (T. 730).

Dorothy Bennich, the Detroit area Manager for National Car Rental, produced documents which established

⁸ The Kilbourne State Bank is located at 6055 West Lisbon Avenue, Milwaukee, Wisconsin.

⁹ The Matador is, of course, an American Motors Car.

that the Matador identified by Meyer and Langford was leased on February 28, 1976 and returned to National's Detroit Metropolitan Airport office on March 3, 1976 at 12:28 P.M. When the car was returned, it was checked in and the mileage noted. The car was officially recorded as missing after an inventory taken on March 5, 1976. An earlier check disclosed that the car was unaccounted for on March 4, 1976 as well (T. 699-704).

Lillian Cavanaugh, the credit manager of the Sheraton Cadillac Hotel, Detroit, Michigan, testified and produced records which established that one Louis McIntosh registered for two rooms on February 29, 1976. The Hotel's records, including those kept by the housekeeping staff, indicate that the room was vacated after 6:00 P.M. on March 3, 1976. Further, records of room charges established two phone calls placed from the McIntosh rooms on March 3, 1976. One call was to New York; the other was to Atlanta, Georgia (T. 680-689).

Gary Schaffer, a Michigan State Trooper, testified that on March 5, 1976, while on patrol on Interstate I-94 which connects Detroit and Chicago, he stopped the car, previously described as the car rented in Atlanta by Shiela Duhart with Louis McIntosh, and arrested the driver for drunk driving.¹⁰ The driver identified himself as Abraham Williams. "Abraham Williams" was taken into custody, fingerprinted, and photographed. The photograph which was admitted in evidence was that of Robert McGray. The passenger in the car identified himself as Louis McIntosh. He was not printed or photographed, but had extensive dialogue with Schaffer regarding his personal history information and the posting of bail. Schaffer identified Charles Williams as the passenger in the rental

¹⁰ This, of course, was the car observed by Mrs. Dobberk on the morning of the Kilbourne State Bank robbery.

vehicle whom he spoke to extensively on March 5, 1976. (T. 430-435).¹¹

Booker T. Brantley, president of the Greenbriar Lincoln Mercury dealership in Atlanta, Georgia, testified that on March 12, 1976, the day following the robbery of the Kilbourne State Bank, a woman named Sheila Duhart and a black male came to his dealership and inquired about the purchase of a Lincoln Continental. After some discussion Brantley recommended to the man that he enter into a rental arrangement with an option to purchase. The man declined to use his name but suggested that the rental agreement be undertaken in Duhart's name. Duhart and the black male later returned, and the man delivered to Brantley and his salesman \$5,000 in cash, which he apparently produced from a paper bag. Brantley testified that one hour prior to his having taken the witness stand, he had chosen Charles Williams from a lineup of eight persons as the gentleman who gave him \$5,000 toward the rental of the car. It was later stipulated that Charles Williams was still driving that car during May of 1976 in Queens, New York (T. 829).

At some point after King had returned to New York, he received a call from McGray, who advised him that Williams was coming back to New York (T. 104). Eventually, the defendants and King met together and began preparations for another robbery. Over a period

¹¹ William Bodziak, a document analyst for the Federal Bureau of Investigation, testified that he had compared known exemplars of McGray's handwriting with the signature of "Abe Williams" that appeared on the Hyatt Regency Hotel register cards along with "Louis McIntosh." He determined that there was common authorship. It was stipulated, however, that Bodziak could not reach a conclusion regarding the Louis McIntosh signature after comparing it with known exemplars of Williams's handwriting (T. 794).

of a week or two, the three of them "cased" banks in Manhattan, Brooklyn, and Long Island. Finally, they decided on a bank near Sunrise Highway in Long Island (T. 105). The three then set about assembling the gear they would need to execute the robbery. King still had a rifle and pistol from before. By the morning of the robbery, the group had secured masks, changes of clothing, and gloves (T. 106-107). On the evening before the robbery, King stole a brown Maverick from an indoor garage located on "Carson" Avenue in Brooklyn. The car was "stashed" for use on the following day (T. 106).

On the morning of the robbery, Williams met King at King's residence and they drove to Queens to pick up McGray. After they were all together, the group split into three cars—including the stolen Maverick—and proceeded out toward Long Island. The defendants and King first drove by the bank to satisfy themselves that "everyt'ing was in order." They then proceeded to a pre-selected flip spot, which, as in the other robberies, was a parking area behind some residential buildings (T. 108). Williams, McGray, and King "geared up", entered the stolen Maverick, and drove to the bank. On arriving there, they waited until the coast was clear and entered the bank as they had always done before. McGray went in first and "secured the floor". Williams and King went over the counter and took the cash. On McGray's signal, they all left the bank, McGray having kept time as always (T. 109-110). The group entered their getaway car and drove back toward the flip spot. In the middle of the street, the Maverick stalled but started again and they reached the flip spot without further incident.¹² As before,

¹² Wayne Howard, an employee of an Oldsmobile dealership located behind the Nassau Savings and Loan Association, testified that on May 6, 1976, he observed three ski-masked individuals, one carrying a shotgun, run out of the bank and enter a brown Maverick. Howard indicated that the car drove off but that after

[Footnote continued on following page]

the robbers changed clothes, abandoned the "hot" Maverick, got into their legit cars, and left the area.

Two employees of the Nassau Savings and Loan Association located in Rockville Centre, New York testified that they were present in the bank on May 6, 1976 when three masked robbers entered. After hearing a disturbance near the bank's entrance, Angelo Ferricane saw a ski-masked man wielding a shotgun who ordered himself and others to get on the floor and face the wall. (T. 635-640). On that same morning, Margaret McDonnell, a teller in the bank, after hearing a commotion, looked up in time to see a man wearing a ski mask and carrying a pistol vault the teller's counter and begin taking money from the teller's drawers. She noticed another ski-masked individual behind the counter who was similarly occupied taking cash (T. 608-610). McDonnell stated that through the eye holes of the ill-fitting ski masks, she was able to determine that the robbers were black (T. 616-617).

Both of the employees were impressed with the speed with which the robbery was conducted. McDonnell, who identified a series of 122 sequential photographs depicting the May 6th robbery, noted that a clock clearly visible in all the pictures showed that at the start of the robbery (picture number 1) the time was 10:10 a.m. In the last surveillance photograph (number 122), which showed the robbers leaving the bank, the clock's hand had not moved from the 10:10 a.m. position.

it turned a corner, it stalled (T. 647). Howard took this opportunity to take down the license plate number of the car. It was later stipulated that the car identified by Howard had been parked by its owner in the basement garage of an apartment building located on Clarkson Avenue in Brooklyn on May 5, 1976 and was discovered missing at 8:15 a.m. on May 6, 1976 (T. 827). (We believe that p. 106 of the transcript is in error, where King refers to a "Carson" Avenue. A check of the Brooklyn zip code directory reveals that there is no "Carson" Avenue.)

The Defense Case

The defendants pursued two avenues of defense. The first was to impeach the credibility of the accomplice witness King, both through cross-examination and by the production of a witness who allegedly had a compromising conversation with him. The second was to concede that the Government's evidence resolved many factual issues but not the ultimate issue: whether or not the defendants in fact committed bank robberies. In addition, the defense called as a witness an employee from one of the banks whose description of the robbers was marginally inconsistent, if at all, with that of the other witnesses.

In pursuit of the first avenue, the defense called Alvin Scott to testify. Scott, who was currently serving a twenty-five year prison term and whose last conviction was for bank robbery, testified that in March of 1977, he met Curtis King while they were both lodged at the Metropolitan Correctional Center (MCC). Scott stated that during their first meeting, he advised King that he had participated in a lot of bank robberies. He complained to King that he was placed in his unfortunate position because his accomplice in a bank robbery was "telling on him" (T. 881). According to Scott, King then volunteered that he had committed several bank robberies himself and that he was going to tell on someone. At this point, Scott told King that telling on someone was the thing to do (T. 881). King confided to Scott, however, that he could not name the "real" people who had committed these robberies because they were close to him. Indeed, one of the "real" robbers was King's son. King told Scott at this point that he was going to have to come up with some names now for the Government.

At this point King asked what he should do, to which Scott replied, "get somebody that done something to you" (T. 882). King stated that he couldn't think of anyone to

name. In a later conversation, King told Scott that a person named "Jazz" or "Chaz" might be having an affair with King's wife (T. 881). King also related an incident to Scott involving a violent altercation between a person named "Sabu" and King's son. Scott stated that he suggested to King that he name "Chaz" and "Sabu". (T. 883). According to Scott, King also said that he had had a shoot-out with two persons named "Eddie" and "Gary". Scott encouraged King to throw in those names too.

Scott testified that he felt responsible for the predicament of the defendants. Scott stated that not more than a week prior to the day of his testimony, he somehow learned that this person named "Jazz or Chaz" was currently at the M.C.C., that he was on trial, and that King was testifying against him. He denied ever having met "Chaz" before that time. He also insisted that he had never met "Sabu".¹³

Stacey Fox, an employee of the European American Bank on Brush Hollow Road in Westbury, was called to testify that when she was questioned by the FBI after the February 9th robbery, she stated that she had seen light or white skin under the mask of one of the robbers. She stated, however, that at that time she was pressed to make a choice regarding whether the robber was white or black. She stated that if forced to choose, she would have to state that based on her observation the robber was "more white than black" (T. 865). However, she also stated that the robber's voice had a "Black tone, heavy Southern Black accent" (T. 860).

¹³ It should be noted that when Scott testified regarding his March, 1977 conversations, he overlooked (or most likely was unaware of) one major problem: At the point Scott allegedly suggested that King name "Chaz" "Sabu", "Eddie", and "Gary", King had already given three sworn statements in December of 1976 and Grand Jury testimony in February, 1977, implicating them in the robberies.

Williams called his mother to state that, to her knowledge, he her son hadn't had the keys to her house since sometime in 1975. The Government stipulated, in lieu of his testimony, that Williams' father never owned a station wagon.

POINT I

McGray was not deprived of the effective assistance of counsel.

"Any experienced criminal law practitioner would have immediately recognized the potential exposure of incarceration to Mr. McGray in this case *and would therefore have presented a vigorous defense.*" (McGray's Brief at 16). [emphasis added].

With this bold declaration, McGray begins his argument that his counsel, James Bing, was ineffective in defending his cause at trial. That statement captures the spirit of McGray's entire argument. We submit that at bottom, the Court will find that what McGray actually raises on this appeal is a dispute over strategy, and not a legitimate issue regarding the competence or effectiveness of the representation he received at trial.

This Court has repeatedly stated that in this Circuit, the standard for determining whether counsel was inadequate was enunciated in *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). "[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of *habeas corpus* . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceeding a farce and mockery of justice." Moreover, this

standard has been reaffirmed "numerous times in recent years." *Rickenbacker v. The Warden, Auburn Correctional Facility*, 550 F.2d 62, 65 (2d Cir. 1976); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir.), cert. denied, 417 U.S. 972 (1974); *United States v. Sanchez*, 483 F.2d 1052 (2d Cir. 1973), cert. denied, 415 U.S. 991 (1974); *United States ex rel. Marcelin v. Mancuse*, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); *United States ex rel. Scott v. Mancuse*, 429 F.2d 104, 109 (2d Cir.), cert. denied, 402 U.S. 909 (1971); *United States v. Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970).

While we recognize that in *Rickenbacker v. The Warden, Auburn Correctional Facility*, *supra*, Judge Smith suggests, and Judge Oakes strongly urges, a reconsideration of the *Wight* test, that question need not be decided here, since under the facts and circumstances of the case at bar, Mr. Bing's performance meets the alternative standards adopted by other Circuits. See, e.g., *United States v. DeCoster*, 487 F.2d 1197, 1201 (D.C. Cir. 1973) ("reasonably competent assistance of counsel acting as a diligent and conscientious advocate"); *United States v. Fessel*, 531 F.2d 1275, 1278 (5th Cir. 1976) ("counsel reasonably likely to render and rendering reasonably effective assistance"); *Johnson v. United States*, 506 F.2d 640, 646 (8th Cir.), cert. denied, 420 U.S. 978 (1974) ("the standard would be the test for the degree of competence prevailing among those licensed to practice before the bar").

A review of Mr. Bing's performance in the context of the critical factual issues presented at the trial and the substantial circumstantial evidence introduced against the defendant compels the conclusion that his conduct of the defense was appropriate under the circumstances. It

should be noted at the outset that Anthony Lombardino, trial counsel for Williams, and Mr. Bing conducted a coordinated defense dictated by the factual allegations. We submit that the statement of facts supports the conclusion that in this case, the defendants had to sink or swim together.¹⁴ Against that backdrop, it is clear that many of the examples of ineptitude cited in support of McGray's claim are patently misleading. We take this opportunity to repair the record.

McGray points out that Mr. Bing waived his opportunity to make an opening statement. He omits to mention that counsel for both defendants waived openings (T. 30-31).

McGray advises the Court that Mr. Bing's cross-examination of the Government's principal witness, Curtis King, was brief (T. 400-419). McGray neglects to mention, however, that Mr. Lombardino cross-examined King for a full day and a half and that the questioning spanned some 285 pages of transcript (T. 115-400). There was little ground left for Mr. Bing to cover, and the record amply supports the proposition that Lombardino's cross-examination, because of the factual allegations in the case, *necessarily* covered all possible areas affecting both defendants. We are sure that the Court appreciates the wisdom of counsel's forbearance under the circumstances.

Next McGray recites a list of witnesses Mr. Bing failed to cross-examine. McGray's brief anticipates accurately the Government's response to this point; namely, that the decision not to cross-examine these witnesses was a strategic choice consistent with a wholly appropriate low-key defense. We do not apologize for this position

¹⁴ Anthony Lombardino, trial counsel for Williams, is a former Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York.

and the record more than adequately supports it. State Trooper Schaffer, for instance, did not simply identify McGray as the person posing as Abe Williams; he produced a photograph of McGray taken at the time he arrested McGray for drunk driving. Mr. Bing's position in summation, consistent with his conduct at trial, was that the Government had proved beyond a reasonable doubt that McGray was guilty of drunk driving and using an assumed name—but so what? (p. 973-981).¹⁵ None of the other witnesses cited identified McGray. McGray's remark at page 32 of his brief is most appropriately an admission: “. . . second-guessing strategic choices is not the basis of relief for claims of ineffective counsel. *United States v. Yanishafsky*, 500 F.2d 1327 (2d Cir. 1974).”

We rely on the Court's experience and judgment in evaluating several claims of unpreparedness by Mr. Bing. It does not seem likely under the circumstances that Mr. Bing was aware of the existence of the federally incarcerated bank robber his client wanted to call as a witness much before Mr. Bing made application to the court for his production. It is not unusual for defendants to suggest to their counsel the names of potential witnesses mid-trial, and to hold Mr. Bing responsible for such an event is to presume his clairvoyance.¹⁶

¹⁵ It should be noted that each of the witnesses was cross-examined by Mr. Lombardino and that throughout the trial it was his turn to cross-examine first.

¹⁶ McGray makes a similar claim with regard to the so-called tardy application for the production of Scott. We submit that the latter situation sheds light on the former. It is nonsense that Mr. Bing should have been aware of the criminal record or even the existence of Scott, who, his testimony to the contrary, was very likely an acquaintance of Williams and/or McGray. We submit that the same kind of circumstances existed with regard to Lewis.

It is enlightening to note how defendant's personal participation in matters affecting the conduct of his defense influenced decisions on trial strategy. Again, defendant's brief accurately anticipates that we would call this Court's attention to certain colloquy between Mr. Bing and the Trial Court which appears at T. 837:

Mr. Bing: I would like to put something on the record, your Honor.

The Court: Yes.

Mr. Bing: reason why I am not cross-examining witnesses has almost totally been because my client felt that Mr. Lombardino was doing a very extensive cross-examination and there would be nothing to be added to it.

The Court: You acted under his direction.

Mr. Bing: Under his directions that I listened to him. I also concluded for the most part Mr. Lombardino was very thorough and felt what I would add to it would not be very significant.

At the same time, it made my client happy.

The Court: That is the way your client wanted it?

Mr. Bing: Yes.

The Court: And that is what he instructed you to do?

Mr. Bing: Yes.

It is of no small consequence that Mr. Bing conducted the trial in a manner consistent with his client's wishes, but also in harmony with his own views on the appropriate manner of presenting the defense. Even the ABA Standards relating to the Administration of Justice, which the defendant cites in his brief, support the notion that those tactical decisions which they suggest should be wholly

within the attorney's province, must be arrived at in consultation with the defendant. Here, at least during the course of the trial, there was apparent agreement between counsel and the defendant on trial strategy.

Finally, we invite the Court to read what the defendant characterizes as an inadequate summation. We submit, without reservation, that Mr. Bing's short, concise, and well organized presentation was totally in keeping with his well-reasoned trial strategy and was of the highest quality.

We submit that the defendant had the benefit of effective counsel, and his claim to the contrary is meritless.

POINT II

The government's evidence established a conspiracy to rob banks, including the Kilbourne State Bank in Milwaukee, and evidence concerning the robbery of that bank was properly admitted.

The defendants contend that the Government failed to establish a single conspiracy to rob banks and that, therefore, some, if not all of the evidence relating to the robbery of the Kilbourne State Bank in Milwaukee, which was set forth in the indictment as an overt act of the conspiracy, should have been excluded as unfairly prejudicial. The defendants also argue that if the Milwaukee bank robbery was viewed as a similar act, the trial judge should have given more extensive instructions on similar act evidence.

We submit that the record more than amply supports the Government's allegation that the defendants, along with King and others, conspired to rob banks in general, including the Kilbourne State Bank in Wisconsin. A review of the statement of facts firmly establishes that

Williams and McGray assembled a group of individuals to be tapped from time to time to rob banks. These individuals were trained as bank robbers and each knew his specific function. While the members of the group were not necessarily in constant contact with one another, they generally remained available to "go to work" if called upon. Curtis King testified that during a long distance call he received from Williams, he was instructed to consult with the "group" and see who was available for an out of town job. After it was decided among the members of the group that King would go, King joined the defendants, helped rob the Milwaukee Bank, and returned to New York. Significantly, upon his return home, King delivered \$4,000 to Bell and Graham as their share of the proceeds from the Kilbourne State robbery. Undoubtedly, this payment was in consideration for their continued membership in "the group". The fact that different persons were tapped from time to time to participate in the robberies does not change the character of the conspiracy. *United States v. Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Calabro*, 467 F.2d 973, 982-983 (2d Cir. 1972), *cert. denied*, 410 U.S. 962 (1973); *United States v. Stromberg*, 268 F.2d 256 263-4, *cert. denied*, 361 U.S. 863 (1959). And undoubtedly the nucleus of the conspiracy, the defendants plus Curtis King, remained the same throughout.

The defendants' assertion that even if the conspiracy did embrace the Kilbourne State Bank robbery, there was too much evidence offered on the point, is ludicrous. Should the Government have eliminated Mr. Brantley and Mr. Schaffer as witnesses? Or perhaps the employees of the various hotels and rental car agencies could have been excused? Perhaps the defendants would have felt less prejudiced if Curtis King alone had testified about the Wisconsin robbery. Defendants overlook the fact that the Government was *obliged* to prove at least one overt

act of the conspiracy beyond a reasonable doubt. To wave the existence of an overt act before the jury without proof would have indeed been error.

The Milwaukee robbery is important precisely because there was so much circumstantial proof which corroborated King and tended to establish the identities of the robbers. At this point, the robbery becomes significant as a similar act.

It is well established in this circuit that the rule regarding evidence of similar acts is an inclusionary one, which renders such evidence admissible "for all purposes except to show the criminal character or disposition of the defendant." *United States v. Gerry*, 515 F.2d 130, 141 (2d Cir. 1975); *United States v. Papadakis*, 516 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Bretholz*, 485 F.2d 483, 487-488 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States v. Warren*, 453 F.2d 738, 745 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Deaton*, 381 F.2d 414, 117-118 (2d Cir. 1967).

In ruling on the admissibility of evidence of similar acts, the trial judge is required "to balance the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other." *United States v. Byrd*, 352 F.2d 570, 574 (2d Cir. 1965). Several factors are involved in this balancing: (1) the strength of defendant's connection with the similar act, *United States v. Bretholz*, *supra*; (2) whether the Government has an actual need for the proffered evidence in light of the issues and other evidence available to it, *United States v. Bretholz*, *supra*; (3) closeness in time between the similar act and the act charged in the indictment; and (4) similarity in *modus operandi* between the act charged and the similar act, *United States v. Smith*, 343 F.2d 607, 608-609 (2d Cir. 1965).

Under this balancing test, there could be no more appropriate similar act than the Milwaukee robbery. First (as the defendants apparently agree), both Williams and McGray are strongly connected by the evidence to the Milwaukee robbery. Second, in each of the two Long Island robberies, the robbers were masked and therefore no one inside the banks could identify them. In addition, no fingerprints or other incriminating evidence was left behind at either of the two Long Island banks. There is no doubt, therefore, that, there was a great need for evidence which tended to establish the identities of the masked bandits. Finally, contrary to the contentions of the defendants, the robberies were markedly similar. In the first robbery, a surveillance photo depicts a ski-masked individual with a shotgun consulting a stopwatch. In the second robbery, employees of the bank observed a man with a shotgun, who kept order in the bank. One employee saw a robber moving from drawer to drawer extremely quickly. Both employees heard the floorman count down "5 . . . 4 . . . 3 . . . 2 . . . 1" and give the command "race", whereupon all of the robbers exited the bank. Also, in the first robbery, an employee observed a shotgun-wielding individual in control, while two other robbers took cash from behind the counters. Again, all of the robbers wore ski-masks. We know this robbery was of extremely short duration since the surveillance photos reveal that the robbery was completed inside of one minute. Significantly, the activities concerning the cars used in the robberies was also very similar. Finally, the Milwaukee robbery, sandwiched as it was between the two New York robberies, obviously meets the time requirement of the test.

Therefore, by the standards that apply in this Circuit for determining whether evidence of a similar act is more prejudicial than probative, the Milwaukee robbery is an entirely proper similar act.

We submit that since the Milwaukee robbery was clearly an overt act of the conspiracy, the court need not have charged at all on similar act evidence. However, the charge given was complete and recited the law accurately (T. 1120-1121). Neither defendant objected in chambers when the charge was reviewed or after the charge was given to the jury. Neither counsel submitted an alternative charge on similar acts. Defendants cannot now be heard to complain.

Accordingly, defendants' attack on the Milwaukee robbery evidence is without merit.

POINT III

The district court's charge on accomplice witness testimony was entirely proper.

The defendants' claim that the court's charge on accomplice testimony somehow implied that if the accomplice testimony was corroborated by other evidence, then the jury could convict on "less than a reasonable doubt belief". This contention is absurd. The district court charged as follows:

"You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt" (T. 1115)."

and again at T. 1116:

"The testimony of an accomplice alone, if believed by the jury beyond a reasonable doubt, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.

However, I reemphasize that the jury should keep in mind that such testimony is always to be

received with great caution and weighed with great care.

As I have stated, accomplice testimony by itself may be sufficient to convict, but you should never convict a defendant upon the unsupported testimony of an accomplice unless you believe that unsupported testimony beyond a reasonable doubt."

When this language is viewed in the context of the court's frequently repeated warning that the jury must find guilt beyond a reasonable doubt, there can be no doubt that the jury could only understand the reasonable doubt standard applied under all circumstances.

Significantly, the entire charge on accomplice testimony was reviewed with counsel for both defendants before it was given to the jury (T. 837-856). Neither defendant objected to the charge. They cannot now be heard to complain.

The defendants' claim on this point is frivolous.

POINT IV

The district court acted well within its discretion when it denied McGray's mid-trial application for the production of a witness then incarcerated in a midwest prison.

McGray contends that the trial judge erred in denying his Rule 17(b) application for the production of one Frank Tillman Lewis as a witness in his defense.¹⁷ We submit that under the circumstances of this case, the trial

¹⁷ McGray concedes at the outset that the court's refusal to grant his Rule 17(b) application might not be reversible error.

judge did not abuse his discretion in this regard and that his decision did not in fact prejudice the defense case.

On the day before the Government rested its case and more than a week after the commencement of trial, McGray's trial counsel requested that a potential witness, Frank Tillman Lewis, be produced for trial, at Government expense, from the Federal Correction Institution in Wisconsin.¹⁸ Trial counsel did not state at that time that Lewis was a necessary witness, and he volunteered no offer of proof. The court denied the application for funding but recommended that counsel undertake to subpoena the witness (T. 677-678).

Later that same day, the court indicated that it had signed a writ of *habeas corpus* for the production of Lewis (T. 818). When counsel persisted in his request for costs, the court requested an offer of proof regarding the expected testimony of Lewis. Counsel represented that Lewis would testify regarding statements made to him by King at the Metropolitan Correctional Center. Counsel stated further that the thrust of the testimony would be to impeach the credibility of King. The court responded that the exhaustive cross-examination of King had unearthed more than ample impeachment material, including his lengthy criminal record and the unseemly incident between King, the co-defendant Bell, and King's wife. Counsel could state no more in reply than that Lewis could give "valuable input" into McGray's defense. After taking into consideration all of the circumstances, the court again denied the application (T. 718-723). On the following day and in connection with McGray's application, the

¹⁸ We have already stated that under the circumstances, and given the likelihood that Lewis was a witness "discovered" by one or more of the defendants rather than Mr. Bing, the tradiness of the application was likely attributable to the defendant personally—and not to Mr. Bing.

Government's attorney reported to the court that less than two months before, Frank Tillman Lewis had been called to testify on behalf of a severed co-defendant at another bank robbery trial. Lewis, who had already been convicted of bank robbery and sentenced to 30 years imprisonment, testified on direct examination on behalf of the defendant, waiving his Fifth Amendment Privilege, but refused to answer questions posed to him on cross-examination by the prosecutor. Judge Platt directed Lewis to answer, Lewis declined, and was held in contempt. Lewis was sentenced to six months on the contempt charge. The Assistant United States Attorney also informed the judge that Lewis's attorney had contacted him and stated that if Lewis were called, he would advise him to assert his Fifth Amendment Privilege, since his conviction was presently being reviewed on appeal (T. 806-807).¹⁹ At this point, trial counsel did not persist in his application.

This Circuit and others have repeatedly held that an application to summon witnesses at the expense of the Government is addressed to the sound discretion of the trial judge. See, e.g., *United States v. Beasley*, 479 F.2d 1124 (5th Cir. 1973); *United States v. Paccioni*, 224 F.2d 801 (2d Cir. 1955). And the denial of such an application made after the commencement of trial has been upheld. *Paccioni*, *supra* at 802. Where, as here, the testimony would be merely cumulative, the court clearly has not abused its discretion when it denies such an application. It should be noted that when on the last day of trial McGray's counsel made application for the production of Alvin Scott, a locally incarcerated prisoner who would give testimony similar to that expected of Lewis, the court

¹⁹ Lewis's convictions on both the robbery and contempt charges were considered and affirmed by this Court. *United States v. Frank Tillman Lewis*, — F.2d — Slip op. 451 (2d Cir., Decided November 21, 1977).

undertook his production. Under all circumstances, it is clear that the trial judge did not abuse his discretion, and defendants' claim in this regard is meritless.

POINT V

The defendants were not prejudiced by questions posed to the witness Scott by the court.

The defendants claim that questions posed by the court to their witness, Alvin Scott, had the effect of discrediting Scott. With this contention we disagree and submit, in any event, that given the totality of his testimony, the court's questioning did not prejudice the defense case.

While this Court has cautioned trial judges to refrain from active participation on one side or the other, *United States v. Reed*, 526 F.2d 740, 743 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976); *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960), this Court has also recognized the trial judge's authority to ask questions which may assist the jury in the evaluation of the nature of the transactions under consideration. *United States v. Natale*, 526 F.2d 1160, 1170 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). See also *United States v. Lamont*, — F.2d —, Slip op. 6337, 6351 (2d Cir., Decided October 28, 1977).

Alvin Scott gave somewhat confusing testimony regarding how he managed to learn that the person he knew as "Jazz" or "Chaz" was currently on trial and that King was testifying against him. The court asked Scott how he had sent for "Chaz" and when. Scott explained that on the Saturday preceding his testimony, he sent for "Chaz" through the "grapevine". Scott further stated that on that same day he met "Chaz" for the first time and related to him his prior conversations with King (T.

893-894). The court later inquired of Scott, who had opened his testimony by giving praises to Allah, whether or not he had a particular religious day. Scott said that he did not and that Friday had no particular religious significance for him. Scott stated that he was not aware of whether or not "Chaz" was a member of his faith. Still later, during Scott's cross-examination, the court sought to clarify whether or not and when Scott had contacted Williams's attorney. Scott explained that on the day preceding his meeting with "Chaz" he had obtained through an intermediary the telephone number of Williams's attorney. Scott called and left a message with the attorney on that same day. In response to the court's questions, therefore, Scott gave a somewhat plausible account of his initial contact with "Chaz" and said nothing inconsistent with his statement that he had only recently met him (T. 908-909). A review of the questions posed by the court reveals that the trial judge gave every appearance of a curious observer seeking to clarify confusion. The court's questions did not take on the character of cross-examination. At the beginning of his charge to the jury delivered on the following day, the court instructed as follows:

In any event, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind because I tell you here and now I have come to no conclusion in this case, nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendants. (T. 1061)

and on the following page:

As to the Court's questions to witnesses during the course of the trial. During the course of the

trial I asked questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times that you as jurors are at liberty to disregard all comments of the Court in arriving at your own findings of the facts. (T. 1062)

We submit that in light of the totality of his testimony, it could not have been the court's questions that compelled the jury to disbelieve Scott. As has already been pointed out, the objective evidence belied any notion that Scott suggested and King agreed that he name "Chaz" and "Sabu" in March of 1977. The jury, if not Scott, was keenly aware that King had already named Williams and McGray as his accomplices in December of 1976 and before a Grand Jury in February, 1977.

We submit that the trial judge's questions to Scott did not prejudice the defense case and that the defendants' claim in that regard is without merit.

POINT VI

The identification testimony of Schaffer and Brantley was properly admitted.

The defendant Williams contends that the identification testimony of two witnesses who identified him should have been disallowed because photo-spreads each had viewed long before the defendant's indictment and trial had not been preserved. Williams concedes that there is no right to counsel issue, citing *United States v. Wade*, 388 U.S. 218 (1967) and *United States v. Ash*, 413 U.S. 300 (1973). See also *United States v. Bennett*, 400 F.2d 888 (2d Cir. 1969). Williams argues, however, that this Court's decision in *United States v. Tolliver*, — F.2d

—, slip op. 863 (2d Cir. January 3, 1978), indicates that *Brady v. Maryland*, 373 U.S. 83 (1963), compels the Government to preserve the photo spreads in question to be made available to counsel. We submit that *Tolliver, supra*, is inapposite to the case at bar, and that in any event, Williams was not prejudiced by the failure to produce the spreads under the circumstances of this case.²⁰

The situation in the case at bar is not unlike that confronted by this Court in *United States v. Reid*, 517 F.2d 953 (2d Cir. 1975). In that case the Government conceded that the display of a single photograph to a prospective witness was impermissibly suggestive. Notwithstanding that concession, the Court permitted identification testimony to stand where "other evidence connecting a defendant with the crime" decreases the likelihood of misidentification. *Id* at 967.

In the case at bar, the testimony of both Trooper Schaffer and Brantley was more than amply corroborated by evidence which tended to prove what their in-court identifications were offered to establish. In the case of Schaffer, where the issue resolved was the use of the McIntosh identity by Williams, the testimony of King, the photograph of McGray, the stipulation that Williams was still driving the Lincoln he had leased from Brantley as late as May 1976, and other evidence concerning various cars and hotels all tended to establish that Williams and McIntosh were one and the same. Moreover, the nature of Schaffer's contact with Williams is important in

²⁰ We need not reach the question of whether or not the requirements for recording line-ups, announced in *Tolliver*, implies a similar preservation requirement for photo spreads, since this Court specifically held that its decision would apply prospectively and not retroactively. *Tolliver, supra* at 870, footnote 4. We urge, instead, that the Court determine whether or not Williams was prejudiced by the failure to produce the spreads.

determining whether misidentification was likely. Schaffer testified that after he arrested Williams he obtained extensive personal history information from him. In addition, Williams posted, and Schaffer accepted a \$100 bond to secure Williams' release. The *Reid* court took into consideration the fact that as a law enforcement officer, the person making the identification in that case was a trained observer. 517 F.2d at 966. The same reasoning doubtless applies in evaluating Tropper Schaffer's ability to observe and remember.

With regard to Brantley, the accuracy of his identification was all but conceded when Williams stipulated that he was in fact still operating the car he had purchased from Brantley two month later. Taken together with the fact that Brantley had selected the defendant from among ten photographs more than a year before the trial and that he had selected Williams from a line-up, in the presence of Williams' attorney, moments before he testified, there can be no doubt that Brantley did not misidentify Williams.

Therefore Williams' claim in this regard is without merit.²¹

POINT VII

The admission of King's prior statements into evidence was proper.

The defendants urge that the admission into evidence of the prior statements of King, which related to the three robberies alleged in the indictment, was improper.²²

²¹ It should be noted that the existence of the spreads was before the jury, as both Schaffer and Brantley testified that they had previously been shown photographs (T. 449). Judge Bramwell charged the jury extensively on the frailty of eye-witness testimony.

We submit that under the circumstances of this case, the admission of those statements was amply justified.

As has already been pointed out, trial counsel for Williams cross-examined Curtis King for one day and a half. It is fair to say that three-quarters of his examination of King consisted of questioning him regarding "inconsistencies" between King's testimony and his signed statements. The vast majority of those questions did not disclose inconsistencies, but rather so-called omissions from the relatively short statements. In addition, trial counsel on many occasions framed his questions about the statements improperly. Typically, counsel would ask King whether or not he told some detail about an incident to the FBI and then immediately asked whether that information was in his statement—leaving, of course, the misleading impression that telling the FBI and including information in the statement were one and the same thing. In addition, ostensibly for the purpose of confronting King with an inconsistency in his statements, counsel read and/or paraphrased passages from the statements, even where there was no apparent inconsistency (T. 263). In response to such a maneuver, the trial judge warned counsel that he was using the statement as if it were in evidence, but that if he wished, the court would receive it in evidence (T. 189).²³ Counsel

²² Williams's brief characterized the documents admitted into evidence as "unedited, unredacted, prejudicial FBI reports of statements." By a letter dated February 22, 1978, Williams has amended this point to state that documents were in fact verbatim signed statements of King. The statements are attached as our appendix.

²³ It is important to note at this juncture that the statement to which the court and counsel were referring was the December 8, 1976 statement regarding the February 9th robbery of the European American Bank.

complained at a sidebar conference that the court had made it appear that he was obliged to offer the statement. The court reminded counsel that the statement had heretofore been used improperly, but that if counsel wanted to continue to use the statement for impeachment purposes only he could, as long as he asked proper questions. The court soon afterward instructed the jury that nothing it said should be construed as imposing on the defendants an obligation to offer the statements in evidence. Counsel continued questioning King in much the same manner as before with the court's indulgence.

On several occasions counsel, using the statements, asked questions that appeared to be deliberately confusing to the witness. On one occasion, counsel asked King a long series of questions about the first robbery, ending with a question on the description of the getaway car that was used. Counsel then used the statement corresponding to the third robbery to impeach King's testimony regarding the car used in the first (T. 263).

Purportedly in the context of questioning King with regard to still another inconsistency, and with the permission of the court, counsel read a substantial portion of the statement relating to the Milwaukee robbery into the record (T. 392, 395). Soon afterwards counsel read all but the last eight lines of the statement relating to the third robbery into the record. After admitting that this statement was different from the "Milwaukee" statement he had been permitted to read from, counsel offered the statement in evidence.²⁴

²⁴ Contrary to the assertion in Williams's brief, this was not the same statement that was the subject of the court and counsel's discussion earlier during cross examination (T. 189-190). It was, instead, a statement relating to a different bank robbery, which, we submit the record indicates, was offered quite voluntarily.

At the close of cross-examination by both counsel, the Government introduced the two remaining statements into evidence. The record clearly shows that better than two-thirds of those statements were already before the jury after cross-examination. The trial court wisely received the confessions in evidence under the completeness rule, so that the jury could have each of the statements before them. Federal Rule of Evidence, Rule 106. In addition, the court found the confessions were admissible as prior consistent statements since cross-examination was replete with implied and direct accusations of recent fabrication (T. 426-427). Federal Rules of Evidence, Rule 801(d) (1) (B).

Rule 106 provides as follows:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In most situations, the application of this rule is a matter of the trial judge's discretion. "[T]he trial judge must weigh in each case the adequacy of the repair work to rectify the misleading impression possibly created by incompleteness against the waste of time and attention and the unfairness involved in blunting the proponent's presentation of his case when everything is required to be read at one time." Weinstein, *Evidence* at 106-77. There can be no doubt that under the circumstances, the court acted well within its discretion in admitting the statements and repairing any misleading impressions regarding the content of the statements created by defense

counsel's cross-examination. We submit, therefore, that the admission of these statements was entirely proper.²⁵

POINT VIII

The sentences imposed upon Williams and McGray were entirely proper; and neither defendant can complain of any unwarranted disparity in sentencing.

a. The defendants claim that the trial judge erred in charging the jury that it could return guilty verdicts on both the 2113(a) and 2113(d) counts respecting both robberies charged as substantive offenses (Counts Two, Three, Four, and Five). This claim is without merit.²⁶

This Court has held that a conviction on more than one count for a single bank robbery under the Federal Bank Robbery Act is not improper. *Gorman v. United States*, 456 F.2d 1258 (2d Cir. 1972). The *Gorman* Court also recognized, however, that a defendant cannot be sen-

²⁵ The statements may also be admissible as prior consistent statements under Rule 801(d)(1)(B). This Circuit has held that a "trial judge normally has great discretion in determining if a prior consistent statement is authorized to rebut a defense charge of recent fabrication." *United States v. Vito*, 467 F.2d 1401 (2d Cir. 1972). And in discussing the legislative history of the Rule, Judge Weinstein cites "the limited possibilities of abuse of rehabilitative statements." Weinstein *Evidence* at 801-99. In the case at bar, King's signed confessions are essentially the same as his testimony.

²⁶ Williams states in a footnote at page 19 of his brief that he did not receive a copy of the sentencing minutes before the defendants' filing date. It is possible that this point would not have been raised had he had the opportunity to inspect that transcript. However, since we have received no indication that the issue is withdrawn, we will respond briefly. We assume McGray joins Williams on this issue.

tenced to consecutive sentences for 2113(a) and 2113(d) convictions entered in connection with a single bank robbery. *Prince v. United States*, 352 U.S. 322 (1957). Similarly, the Court recognized that the *Prince* rule applied equally to concurrent sentences. *United States v. Tarricone*, 242 F.2d 555 (2d Cir. 1957). In order to comply with the rule in *Prince* and at the same time provide a defendant charged with multiple bank robbery counts a final appealable judgment on each count, the *Gorman* Court adopted the Third Circuit rule that a single *general* sentence would be appropriate and advisable in all multi-count cases under the Federal Bank Robbery Act. Both defendants in the case at bar were given general sentences on Counts Four and Five together (2113(a) and (d) respectively) and Counts Two and Three together (2113(a) and (d) respectively).²⁷ Therefore their sentences were perfectly proper.

b. Without citing any similarities or dissimilarities in the circumstances between and among Williams, McGray, Bell, Graham, or Hairston, the defendants on appeal contend that the sentences given each of these five individuals represent an unwarranted disparity calling for vacation of defendants' sentences.

This Court has repeatedly affirmed the well-settled principle that sentencing is a matter totally within the discretion of the trial judge and that, generally, a sentence which is within statutory limits is not subject to appellate review. *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976), *rehearing denied*, 553 F.2d 8 (1977); *United States v. Stein*, 544 F.2d 96, 101 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976). The case upon which defendants rely, *United States v.*

²⁷ For Williams, see sentencing minutes pages 15-16. The docket sheets filed as part of the appendix to the defendant's brief disclose the sentencing described above.

Wiley, 278 F.2d 500 (7th Cir. 1960), is by that court's own admission the exception rather than the rule. That court stated "only in an exceptional case will this court interfere with the discretion exercised by a district court in imposing sentence upon a defendant in a criminal case". *Id* at 503. The *Wiley* court was confronted with a situation where a minor defendant with no prior criminal record was "arbitrarily singled out" and imprisoned for a more severe term than his admittedly more culpable co-defendants, who were chronic offenders. That is hardly the situation presented in the case at bar. Judge Bramwell, before sentencing Williams, stated the following:

This defendant was the ring leader of a group who had executed several robberies in 1976, in the Eastern District of New York and elsewhere. FBI reports indicate that the defendant is the most culpable of the group, and that he actively trained and prepared his co-defendants for these offenses. None of the proceeds from these robberies estimated at over \$114,000, has ever been recovered.

At the time of the instant offenses, the defendant was a fugitive from the New York City Department of Corrections, following a successful escape from the Queens House of Detention in January 1976, where he was being detained for a June 1975 supermarket robbery and attempted murder of two New York City police officers. Prior to that June 1975 offense, the defendant had been mandatorily released to this District following a term of incarceration for a previous bank robbery conviction in this Court. Concurrently, while on a mandatory release, the defendant was out on appeal following his conviction and 25 year sentence in the United States District Court for the Western District of Michigan, on December 22, 1975.

The defendant has a 12 year pattern of larcenous offenses that have escalated into a very and potential danger. This criminal behavior continued while he was an inmate in the Federal Correctional [Institution] and increased upon his release. (Sentencing Minutes, pp. 9-10).

Bell, on the other hand, was indicted and convicted for the conspiracy and the robbery of the first bank only. Graham, a licensed optician, was convicted of the conspiracy only. Hairston was charged in the conspiracy only and pled guilty.

We submit, therefore, that the defendants' claim is without merit.²⁸

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
March 10, 1978

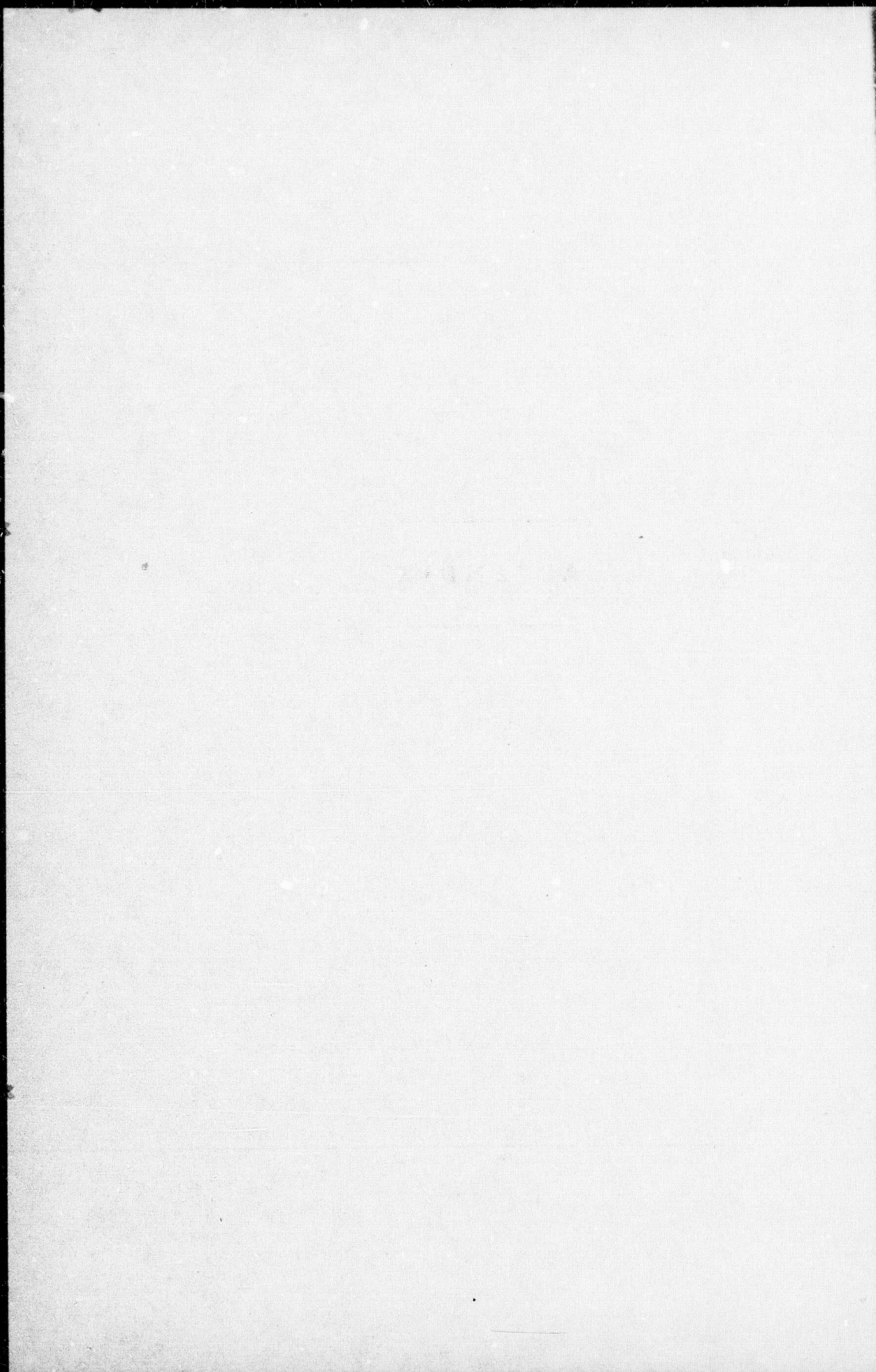
Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

MARY MCGOWAN DAVIS,
ZACHARY W. CARTER,
*Assistant United States Attorneys,
(Of Counsel).*

²⁸ The factual allegations recited by Judge Bromwell with regard to the relative culpability of the actors in this bank robbery scheme obviously apply to the defendant McGow as well.

APPENDIX



Government's Exhibit No. 6

"On a date which I am unable to recall, a winter day in 1976, I Curtis King, left my home at 1065 Vermont Street, Brooklyn, N.Y, with one Gary Graham, whom I know to live on Linden Boulevard in Brooklyn. We drove in his grey Toyota to a predetermined location along the Belt Parkway near Aqueduct Race Track. Gary, whom I also know as "G", and I met with Ronald Bell whom I knew to live on Lenox Road in the Flatbush section; Charles Williams; and an individual known to me only as Sabu, who lived in the projects in Long Island City. We left this place after about 30 minutes—Gary and I went in the Toyota, Ronnie Bell drove his car, a burgundy late model Lincoln, with a Negro female whom I did not know, Williams and Sabu drove in possibly a station-wagon. We drove out to Long Island through Hempstead. We all followed Charles Williams, since he planned this whole thing and knew where to go. I remember Peninsula Boulevard, and we drove to an apartment complex about 10-15 minutes beyond Hempstead. At these apartments we parked. After thinking about it awhile, it has become more clear in my mind. I think it was the day before that I with Charles Williams, Sabu, and another negro male, whom I didn't know (I know he was from Hempstead and is employed as a mechanic and drives a grey chevrolet with a cracked windshield) went to New Jersey to a black neighborhood where we stole a car. We found a car with the motor running and I got in it and drove away. We then went to a place along the Belt Parkway, where we stashed this car, and I was taken home. The following morning when we (Williams, Graham, Bell and his girl, Sabu and myself) met at this spot, we also took this car to the apartment complex near Hempstead. From the apartments the five of us went in the stolen car to a European-American Bank located on our left side near the apartments. We pulled up behind the bank. I put on a ski mask and picked up a revolver, Williams

Government's Exhibit No. 6

put on a ski mask and picked up a handgun, Graham stayed in the car as the driver, Bell, put on a ski mask and picked up a revolver, and Sabu put on a ski mask and picked up a shotgun. We went into the bank through a back entrance. Once inside the bank, I with Williams and Bell went over the counter to get the money. Each of us had some type of bag. Sabu stayed on the other side of the counter to "cover everyone". He had a stop watch to time us and keep us moving. When he felt the time was right he hollered "Raise" which meant we were to stop. We then went back over the counter and left the bank. We left the bank and drove to the apartments again. We left the getaway car and got into the other three cars. Sabu went with Williams, Bell had his girl, and Graham and I went together. We left the area all following William's car because we were lost. Soon we ended up on a large busy highway. I don't know how we went but we ended up at my home in Brooklyn. My wife works days so we went into my place to split the money. I got \$3,500—\$4,000 for my share; Bell got about the same amount—then Bell and I had to pay Gary Graham, as the driver, out of our share so we gave him about \$2,500; I have no idea how much Sabu or Williams got since I have no idea how much totally was taken. After the money count, each of us went our separate ways. I have read this statement consisting of this page and two others, I have initialed each page and each correction and I know its contents to be true. I now place my signature.

"/s/ Curtis King

"Witness:

"/s/ Ronald E. Mahaffey SA, FBI, GCRA, 12/8/76."

Government's Exhibit No. 5

On December 21, 1976, contact was made by Special Agent RONALD E. MAHAFFEY at Brooklyn, New York, with CURTIS KING. KING was furnished with a form entitled "Interrogation; Advice of Rights", which he read, stated he understood its contents and indicated his wish to waive these rights by signing same. KING, thereafter, gave the following oral statement:

"On a day (date which I cannot recall) during the winter of 1976, I, King, received a long distance telephone call from an individual known to me as 'Sabu'. 'Sabu' asked if I had any money to which I indicated I was very short. 'Sabu' then asked if I wanted to make some money. 'Sabu' further stated that he and Charles Williams were getting ready to 'get down' (meaning rob a bank) and that they needed one more person to help. 'Sabu' told me to make contact with Gary Graham and Ronnie Bell to decide which of us three would help them. 'Sabu' stated that he would get back to me later that day.

"That evening 'Sabu' called again and this time put Charles Williams on the phone. Charles asked me if I had decided and I told him that yes, I would be the one but I have no way to get where they were in Chicago. Williams told me not to worry, that everything would be worked out.

"The following day I received another call from Charles Williams and was told that everything was fixed and I was told to go to an address (exact number which I cannot recall) in Jamaica near Hillside Avenue.

"The following day I was picked up at my residence, 1065 Vermont Street, Brooklyn, New York, by Ronald Bell and taken to the location which I mentioned above

Government's Exhibit No. 5

near Hillside Avenue. Upon arriving there a negro female, whom I know as Theresa 'Terry' Jordan (a girlfriend of Charles Williams) came out of this location, got into our car and we drove to John F. Kennedy Airport, Queens. Apparently Terry had made all the reservations for when we arrived at the United Airlines terminal, she told me to take care of the bags and that she would pick up the tickets. This was my first time ever to fly and at this point I was quite nervous. Terry and I boarded this flight from Kennedy Airport to "O'Hara Airport, Chicago. When we arrived at O'Hara Airport we were met by Charles Williams and an individual known to me as Rob. We all got into a four door blueish gray Chevrolet and drove to a nearby hotel which I feel sure was named O'Hara. Williams had already arranged for the rooms. There were three in all. Two rooms were adjoining which were occupied by Terry and Charles Williams and myself and Rob. The third room was occupied by 'Sabu' and Melba, whose last name I do not know who flew in from New York late the same day. Charles Williams as far as I was able to understand the setup had rented cars and registered for these three rooms using identification for an individual by the name of McIntosh whose first initial I believe was L.

"The following day I stayed around the hotel with Rob, Terry and Melba while 'Sabu' and Charlie left for several hours. I am not sure what their purpose was in going out but they came back, picked up Rob and went back out again. When they returned we began to party. 'Sabu' is a heavy drinker and had ordered several bottles of cognac from the hotel room service. Before going to bed that night Williams told Rob and myself to move a car which I believe had been stolen and was parked on a street in downtown Chicago. Rob and I again got into the blueish gray Chevrolet and Rob drove downtown near

Government's Exhibit No. 5

an elevator train. He pointed out to me a brown, four-door American Motors car. He recalled there was some tickets on the window because later I brought this to Williams' attention to which he indicated something to the effect 'screw it, we don't have to worry about this car. We drove this American Motors car back to the hotel where we met Williams. I drove the American Motors car and followed Williams and Rob to a nearby apartment complex where we parked the American Motors car and then returned to the hotel. Here we partied for the remainder of the night.

"The following morning we left the hotel, Terry and Melba stayed behind. Myself and Rob took the American Motors car, Williams drove the blueish gray Chevrolet and 'Sabu' drove another car and make and model which I cannot recall, however, I believe this had also been rented by Williams. I remembered driving around for several hours not really knowing where I was. I remembered we looked at a bank I believe the name was North Ridge Savings. The lettering was done in red letters and I remember this bank was located in a shopping center. Williams and 'Sabu' liked this bank, however, Rob and I didn't like the location and the heavy traffic around the bank so we drove off. Somehow we ended up in Milwaukee, Wisconsin, where we saw another bank which we liked. One reason we liked this bank was the fact that while we sat looking at the bank we observed Brinks Armored Car Service make a delivery. Rob got out and went into the bank to look it over, came back to the car and said he couldn't find where the bank had put the shipment that had just arrived. At this time Williams then got out and went into the bank to look it over. After a short time Williams returned to the car and said there were 'Agents inside'. What gave him this impression I don't know, but it was enough to make us split and drive on. Before we drove off, we made some changes in the

Government's Exhibit No. 5

vehicles then. I drove the American Motors car, Charlie and 'Sabu' were in the blueish gray Chevrolet and Rob then drove the car, description which I cannot recall. We drove a short distance and picked up a 'tail' from a marked police car. When we realized this, Charlie who was leading, made a right turn, I made a right turn to follow him and Rob went straight ahead and the police unit followed him. After a short time we saw another bank which we all could agree on. Williams went into this bank to look around and when he returned to the car indicated it was 'cool'. We drove away to look for a 'flip' (a place to park a switch car). We found a driveway near a house in a residential area and here we parked the Chevrolet. The three of us then drove off in the American Motors car and went back to this bank and robbed it.

"Following the robbery of this bank we drove back to the 'flip' where we dumped the American Motors car. Williams got behind the wheel of the Chevrolet and 'Sabu' locked me in the trunk with the guns and the money taken from the robbery. We then drove away. I don't know where we went or in what direction we went but after about 35 or 40 minutes riding they stopped the car and let me out of the trunk. I moved up front and we drove back to the hotel near O'Hara Airport.

"After returning to the hotel we went up to our rooms where we met Rob, Terry and Melba. Here we split the money. After splitting the money we changed clothes and took the clothes back down to the Chevrolet. I remembered we drove a short distance from the hotel around a circle may a quarter of a mile or so on a busy highway like a parkway, with a divider. We threw the revolvers out the car window into the weeds, then got off at the next exit. A short distance from the exit we found a large dumpster type garbage container where we dumped

Government's Exhibit No. 5

the clothes, the shotgun and the ski masks. We then returned to the hotel. I am not sure exactly what happened to the Chevrolet but we all went back to the airport where Terry, Melba and myself caught a flight back to New York arriving at LaGuardia Airport and Williams, 'Sabu', and Rob allegedly departed Chicago for Atlanta, Georgia."

Defendant's Exhibit "F"

"On date not recalled, I met Charles Williams (described as a Negro, male, approximately 6' 2" in height, slender build) at my residence, 1065 Vermont Ave, Brooklyn. We left in a stolen Ford compact car drove to Long Island City where we met an individual known to me as Sabu (described as Negro, male, approximately 6' 0" in height, stocky build, black hair with large Afro, who lives in the "Projects" near 59th Street bridge). We drove then to Long Island via my residence. Charles Williams drove a black Pontiac with Sabu, then Sabu got into a blue Volvo and I drove the small Ford. We drove to a town in Nassau County. We went to a parking lot where we dropped the Volvo and the Pontiac. Then we drove to a nearby bank. We all went into the bank. I wore a ski mask and had a handgun. Charles Williams had a handgun and wore a ski mask, and Sabu wore a ski mask and carried a shotgun. I went over the teller counter and began to gather money and put it into a bag. Williams also went over the counter and put money into a bag he had. Sabu "held the floor" and covered everyone. Sabu kept time and on his signal we joined him and left the bank. We then drove to the nearby parking lot where we dropped the Ford. Sabu and I took the Volvo and followed Williams in the Pontiac. We went to Williams' mother's house in Jamaica where we split the money. I got about \$5,000, I don't know what the others got. We then split up. I have read this statement consisting of this page and one other. I have initialled each correction and each page. I know its contents to be true.

"/s/ Curtis King

"Witness:

"/s/ Ronald E. Mahaffey, SA, F.B.I., G.C.R.A. 12/2/76.

"/s/ Carl W. Amaditz"

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

ZACHARY CARTER

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of March 19 78 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

GARY SUNDEN, ESQ., 400 Park Avenue, New York, New York 10022

ALBERT J. BRACKLEY, ESQ., 186 Joralemon Street, Brooklyn, New York 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Sworn to before me this

13 day of March 19 78

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979